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STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA OCCUPATIONAL SAFETY AND REVIEW BOARD

Steve Keefe, Commissioner,  
Department of Labor and Industry,  
State of Minnesota,

Complainant,

VS.

Minn-kota Excavating, Inc.,

Respondent.

FINDINGS OF FACT,  
CONCLUSIONS  
AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Bruce D. Campbell at 9:00 a.m. on April 16, 1985, in Minneapolis, Minnesota.

Appearances: Kathleen Winters, Special Assistant Attorney General, Second Floor, Space Center Building, 444 Lafayette Road, St. Paul, Minnesota 55101, appeared on behalf of the Complainant, Occupational Safety and Health Review Division of the Minnesota Department of Labor and Industry (Agency or Department); and, Kenneth L. Bergstrom and James Doescher, 3401 85th Avenue North, Minneapolis, Minnesota 55443, appeared on behalf of Minn-kota Excavating, Inc. (Minn-kota, Company, or Respondent).

The record herein closed on May 13, 1985, upon receipt by the Administrative Law Judge of a late-filed exhibit.

Notice is hereby given, pursuant to Minn. Stat. sec. 182.664, subd. 5, that the Findings of Fact, Conclusions and Order of the Administrative Law Judge may be appealed to the Minnesota Occupational Safety and Health Review Board by the Employer, Employee or their authorized representatives within 30 days following the publication of said Findings, Conclusions and order.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are (1) whether Respondent violated 29 CFR SS 1926.150(a)(1) and 1926.352(d), and, as a consequence, Minn. Stat. S 182.653, subd. 3, by failing to provide and maintain a fire extinguisher for the personal protection of employees engaged in welding in proximity to flammable liquids; (2) whether Respondent violated 29 CFR S 1926.604(a)(2) and, as a consequence, Minn. Stat. S 182.653, subd. 3, by

failing to provide and maintain a roll over protective structure on a Fiat-Allis 41B bulldozer when such equipment was engaged in site clearing and tree removal; and (3) if violations of governing standards are found to have occurred, the appropriate penalty, if any, to be assessed.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

i. On September 29, 1983, the Respondent maintained a work place one-half mile south of the junctions of County Roads 31 and 36 in Norman County, Minnesota, known as Project #8 Food Retention Structure. The Respondent was engaged in constructing an earthen water retention structure for the Wild Rice Watershed District and, in conjunction with erection of such structure, brushing and site clearing land from which the necessary earthen fill was to be extracted. That portion of the job site relevant hereto was elevated flat ground covered, originally, with a variety of brush and trees. The site clearing required the removal of both the dense brush and trees sufficient to expose an area containing enough earthen material to construct the flood retention project. The land on which site clearing was undertaken sloped down to a river bottom on which the flood retention project was constructed with the earthen fill taken from the site clearing area.

2. At an unspecified time in 1983, the Company began the site clearing using two pieces of heavy equipment. Trees were pushed over with the heavy equipment as necessary to expose the required fill. The Company maintained at the work site a Fiat-Allis 41B bulldozer and a D8-K bulldozer, as well as several scrapers. The equipment had been moved to the job site in the fall of 1982. The Fiat-Allis bulldozer was moved to the site without its protective roll over canopy for ease of transportation. The roll over canopy with which it was originally equiped was stored at the Company's offices in Minneapolis. The D8-K bulldozer was equiped with a protective roll over canopy.

3. The major portion of the required tree removal was accomplished using the D8-K bulldozer equiped with a protective roll over canopy. On September 22, 1983, after a meeting with the Watershed District, the Company determined to remove the D8-K bulldozer and two scrapers to another project in Ortonville, Minnesota.

4. In late September of 1983, the site had not been sufficiently cleared. It was the intention of the Company to accomplish further site

clearance, including tree removal, with the Fiat-Pdlis 41B bulldozer which was not equiped with a roll over protective canopy.

5. The Fiat-Allis 41B bulldozer was manufactured at an unspecified date after 1969.

6. On September 28, 1983, the operator of the D8-K bulldozer was informed by the Company's job foreman, Lawerance Becker, that further site clearing would be accomplished using the unprotected Fiat-Allis 41B bulldozer. When the operator of the equipment complained about the lack of a protective roll

over canopy, he was informed that he could use a hard hat for protection or leave the job site. On being questioned about OSHA standards, the job foreman responded that OSHA "went out with the Democrats".

7. On September 28 and 29, 1983, the Fiat-Allis 41B bulldozer was used by its operator at the direction of the job foreman for the removal of brush and trees in excess of 25 feet without a protective roll over canopy. Trees continued to be removed by bulldozer at the work site as late as November 4, 1983.

8. On September 29, 1983, an occupational safety and health inspection was conducted by Arthur Fant, Senior Investigator for the Occupational Safety and Health Division. The inspection was a special inspection resulting from a report having been received by the area office about the existence of an imminent danger complaint at the work site. Mr. Fant arrived at the site at approximately 10:00 a.m. on September 29, 1983. He conducted an opening conference with Mr. Lawrence Becker, the job foreman of the Respondent. Mr. Fant explained that he wished to view the clearing operation.

9. At an unspecified time during the OSHA inspection on September 29, 1983, Mr. Becker and Mr. George Poe, a workman, were engaged in welding on equipment at the work site in the normal course of their employment. The men were covered with oil and grease which had penetrated their clothing. Moreover, barrels for the storage of flammable fuel were located in close proximity to the site of the welding and a puddle of fuel had soaked the surrounding ground. No fire extinguishers were maintained at the job site which could have been used by the workman to extinguish any fire resulting from the open welding.

10. During the course of the OSHA inspection, a workman, Don Fjeldt, was operating the Fiat-Allis 41B bulldozer to push over trees and drag brush and fallen trees into piles. The branches of the felled trees and brush being pulled into piles had not been removed.

11. At the time of its operation on September 29, 1983, the Fiat-Allis bulldozer was not equiped with a roll over protective canopy or brush guards.

12. The use of the Fiat-Allis 41B bulldozer to push over trees and drag trees and brush into piles without a roll over protective structure or overhead and rear canopy guards or brush screens exposed the operator, Don Fjeldt, to the hazard of serious physical injury or death.

13. The Respondent, through its supervisory employee, Lawrence Becker, was aware that the Fiat-Allis 41B bulldozer was engaged in felling trees and removing fallen trees and brush without a roll over structure or brush screens.

14. After conducting the inspection, Mr. Fant held a closing conference

with Mr. Becker and the workmen at the site. Mr. Fant emphasized the need to have appropriate fire extinguishing equipment and stated that the Fiat-Allis 41B bulldozer should no longer be used to clear trees or brush without a roll over protective canopy or brush guards. Mr. Becker refused to agree on an abatement date for equipping the Fiat-Allis bulldozer with the requisite protective equipment. After Mr. Becker refused to agree on a compliance date,

Mr. Fant discussed the situation with his supervisor by telephone and was told to close down the machine and the job site. Mr. Becker then telephoned the area supervisor and agreed to discontinue use of the unprotected Fiat-Allis bulldozer for tree and brush clearing. At the closing conference, Mr. Fant advised Mr. Becker that the Company would receive Notices of Citation for OSHA violations.

15. On October 25, 1983, as relevant hereto, the Company was served with two Citations. One citation alleged a violation of 29 CFR S 1926.604(a)(2) for operating the Fiat-Allis 41B bulldozer to accomplish tree removal and brush clearing without a roll over protective structure. Comp. Ex. 7. The violation was termed willful and an adjusted penalty of \$3,024 was proposed. Another Citation alleged violations of 29 CFR 1926.150(a)(1) and 1926.352(d) for failure to provide and maintain a fire extinguisher for personal protection of employees when welding or working around flammable or combustible liquids at the job site. Comp. Ex. 6. An adjusted penalty of \$160 for such violation was proposed.

16. With respect to the citation for failure to maintain fire extinguishers, the \$160 adjusted penalty was calculated as follows. Based on his assessment of the circumstances, Mr. Fant, determined that it involved a D-6 violation. He assigned a D rating to the severity of the situation based on the consequences that could result to the employees if combustion would have occurred from the welding activity. Mr. Fant assigned a one to each of the following factors: proximity to hazard; duration of exposure; work conditions; and employee control. He assigned a zero rating to the injury or illness information factor as a consequence of a lack of statistical information possessed by the Department. He assigned a two to the exposure factor based on the number of employees exposed. The \$280 unadjusted penalty for a D-6 infraction was reduced by 10% for good faith, 10% for a satisfactory history regarding previous violations and 40% for the size of the company. In accordance with the appropriate guidelines of the Department, the 40% reduction for the size of the Company was reduced to 30% by the area office. The total reductions applied by the Department added to 50%.

17. A 50% reduction in an unadjusted penalty of \$280 would result in a penalty of \$140.

18. The adjusted penalty proposed for the operation of the bulldozer without the requisite protective devices was \$3,024 calculated as follows.

Based on his assessment of the violation as willful, Mr. Fant assigned an F rating to the severity factor because of the consequences that could result to the employee should the unprotected cab area be penetrated by a tree or tree branches. The following probability factors were determined by the central office of the Complainant: exposure, 1; proximity to hazard, 2; duration of exposure, 1; work conditions, 0; injury or illness information, 0; control, 2. A combination of the severity of the occurrence with the degree of probability result in a proposed F-6 violation. The unadjusted penalty for a willful F-6 violation is  $\$720 \times 7$  or \$5,040. A 50% credit factor was applied. See, Finding 16, supra.

19. The appropriate arithmetical calculation of penalty for an F-6 violation adjusted by a 50% credit is \$2,520.

20. By letter dated October 28, 1983, Respondent indicated an intention to contest the Citations, the type of alleged violations and the penalties proposed.

21. Complainant served a Summons, Notice and Complaint upon Respondent on December 7, 1983.

22. On December 28, 1983, the Complainant received the Respondent's Answer to the Complaint.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS OF LAW

1. The Minnesota Occupational Safety and Health Review Board and the Administrative Law Judge have jurisdiction herein and authority to take the action proposed pursuant to Minn. Stat. 182.661, subd. 3, 182.664, and 14.50.

2. The Board gave proper notice of this hearing and the Complainant and the Board have fulfilled all relevant substantive and procedural requirements of law and rule.

3. The Respondent is an employer as defined by Minn. Stat. S 182.651, subd. 7.

4. The Respondent, Minn-kota Excavating, Inc. violated the Occupational Safety and Health Standards as published at 29 CFR 1926.150(a)(1) and 1926.352(d) and, therefore, violated Minn. Stat. 182.653, subd. 3 by failing to provide and maintain a fire extinguisher for the personal protection of employees when welding or working around flammable or combustible liquids at the job site. For the reasons set forth in the memorandum, incorporated by reference, such a violation was a serious violation within the meaning of Minn. Stat. S 182.651, subd. 12.

5. The Respondent has failed to establish an affirmative defense to the violation found in Conclusion 4, supra

6. The proposed penalty of \$160 for the violation found in Conclusion 4, supra, is unreasonable in that a proper arithmetical calculation of the amount using a 50% adjustment factor results in a penalty of \$140.

7. The Fiat-Allis bulldozer is subject to the Occupational Safety and Health Standard as published at 29 CFR S 1926.604(a)(2) by virtue of the date of its manufacture.

8. The Respondent violated the Occupational Safety and Health Standard as published at 29 CFR sec. 1926.604(a)(2), and, therefore, violated Minn. Stat. sec. 182.653, subd. 3 by failing to provide and maintain a roll over protective structure on the Fiat-Allis 41B bulldozer when it was being used to clear



trees and brush at the job site. For the reasons hereinafter set forth in the memorandum, incorporated herein by reference, the Complainant has established that such a violation was a willful violation.

9. Respondent has failed to establish any affirmative defense to the violation found in Conclusion 8, supra.

10. No credit for good faith should be applied in reduction of the unadjusted penalty for the willful violation found in Conclusion 8, supra  
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11. As a consequence of Conclusions 7 - 10, supra, the proposed penalty for the willful violation found in Conclusion 8, supra, of \$3,024 is reasonable.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

#### ORDER

The Citations herein are affirmed, except that the appropriate penalty for the cited violation in Citation No. 2, Item 1 is \$140.

The Respondent, Minn-kota Excavating, Inc., shall forthwith pay to the Department of Labor and Industry the sum of \$3,164.

Dated this 17th day of 1985.

BRUCE D. CAMPBELL  
Administrative Law Judge

Reported: Tape recorded

#### MEMORANDUM

Respondent, Minn-Kota Excavating, Inc., has violated the Occupational-Safety and Health Standards relating to the maintenance of fire extinguishers when welding as published at 29 CFR SS 1926.150(a) (i) and 1926.352(d) and the OSHA standard relating to the equipping of bulldozers engaged in site clearing with roll over protective devices and brush guards as published at 29 CFR sec. 1926.604(a)(2). While the defense of the Respondent to the charges is not clearly stated in the record, there were allusions to a defense of affirmative employee misconduct.

#### Maintenance of Fire Extinguishers

The Occupational Safety and Health Standards published at 29 CFR 1926.150(a)(1) and 1926.352(d) require that when welding is performed suitable fire extinguishing equipment must be immediately available in the work area, maintained in a state of readiness for instant use. Moreover, as a general requirement of construction activity, suitable fire extinguishing

equipment must be made available.

There is no dispute in the record that on the day of the OSHA inspection, September 29, 1983, the Respondent's job foreman Lawrence Becker and George Poe, a general workman, were welding on earth moving equipment in close proximity to barrels used to store flammable liquids. Moreover, the men's clothes were covered with oil and grease and a puddle of flammable fuel had soaked the surrounding ground. No fire extinguishers or substitute appliances for fire fighting were maintained in proximity to the welding. Under such circumstances, a clear violation of the referenced OSHA standards has been established.

The Commissioner has also established that the violation is serious within the meaning of Minn. Stat. sec. 182.651, subd. 12 (1984), in that the possible consequences to the workmen of the lack of fire fighting equipment endangered their lives. It could be asserted that the Employer, Minn-Kota, could not in the exercise of ordinary prudence have discovered the risk. Under the applicable statute, the inability of the Respondent to discover and protect against the risk would avoid the violation. Such a circumstance would be directly related to an affirmative defense of employee misconduct.

There is no evidence in the record that Minn-Kota management was specifically aware of welding being done without the necessary fire fighting equipment. However, one of the men engaged in the task, Lawrence Becker, was the construction representative and foreman of the Employer. Under such circumstances, as hereinafter more particularly discussed, the knowledge of the construction supervisor or foreman is imputed to the Employer. Since the job foreman, Lawrence Becker, was engaged in violating the applicable OSHA standards, that action is the action of the Employer. Under such circumstances, the requirements of Minn.- Stat. sec 182.651, subd. 12, are satisfied and a serious violation has been established. The same imputation of the knowledge of the job superintendent or foreman to the Employer would negate any asserted defense of employee misconduct on the part of the supervisory employee.

Which respect to the penalty to be imposed for the violation, the Administrative Law Judge has determined that the recommendation of the Inspector and the Department, corrected for an unintended mathematical error, is reasonable.

#### Lack of Roll Over Protective Device and Brush Guards

The Occupational Safety and Health Standard published at 29 CFR sec 1926.604(a)(2) requires that equipment used in site clearing operations be protected by appropriate roll over guards and, when rider operated, equipped with an overhead and rear canopy guard meeting certain specifications. There is no real dispute in the record that on the day of the OSHA inspection, the

Fiat-Allis 41 Bulldozer was engaged in clearing trees and brush from a tract of land. That activity clearly meets the definition of site clearing. In re Sletten Construction Co., 1974-1975 OSHD paragraph 18,775 (1974); In re Howard, Paul N. Co., 1973-1974 OSHD paragraph 16,699 (1973). The operator of the bulldozer pushed down trees approximating 25 feet, cleared larger trees, dragging them into piles, and moved brush. He was exposed to precisely those hazards that the appropriate standard is meant to avoid.

There can be no serious dispute that the roll over protective device standard is applicable to the Fiat-Allis bulldozer in question even though it

was manufactured prior to the adoption of OSHA regulation in Minnesota but after the effective date of the federal OSHA regulations. 29 CFR sec 1926.1000, which was adopted in Minnesota by reference, requires the retrofitting of bulldozers manufactured between the date of the rule and 1969 with roll over protective devices. It is stipulated that the Fiat-Allis bulldozer was manufactured after July 1, 1969. Hence, it was required to be retrofitted with a roll over protective device by July 1, 1974.

The Department has established that the violation herein was a willful violation. To establish a willful violation, the Complainant must show that the Employer violated the Act in what would otherwise be a serious way and that the violation was committed voluntarily with marked indifference for or intentional disregard of the standards of employee safety. *Western Waterproofing Co., Inc. v. Marshall*, 576 F.2d 139 (8 Cir. 1978), cert. denied, 439 U.S. 965 (1978); *C.N. Flagg & Co., 1974-1975 OSHD paragraph 18,686* (1974); *Cedar Construction Co. v. OSHRC*, 587 F.2d 1303 (D.C. Cir 1978).

In the instant case it is clear that the Fiat-Allis 41B bulldozer was originally equipped with the required protective devices. It was moved to the site without such devices for the convenience of the Employer in transport. Although, apparently, the Fiat-Allis 41B bulldozer was not used for dangerous site clearing, the necessity to remove an alternative bulldozer which was appropriately protected did lead to a prohibited use. At the specific direction of the job superintendent or foreman, a worker was required to operate the machinery without the required protective devices. When the danger of the situation and the applicable OSHA standards were brought to the attention of the job foreman by the operator, the workman was told that OSHA had gone out with the Democrats, that the Employee could leave, or that he could use a hardhat for protection. More callous disregard of an applicable OSHA Standard is hardly possible. While the Company, itself, may have been unaware of the specific activity of its job foreman, as a supervisory employee, his conduct is general attributable to the Employer. *Metal-Fab, Inc.*, 1983 OSHD paragraph 26,417 (1983); *Todd Shipyards Corp.*, 1984 OSHD paragraph 27,001 (1984); *Pennsylvania Power & Light Co.*, 1983 OSHD paragraph 26,518 (1983).

The Company has not established that the actions of Mr. Becker contradicted effectively established work rules or was so idiosyncratic that the employer would not have taken it into account in establishing a safety program so as to avoid responsibility for his actions. *Western Waterproofing Co., Inc. v. Marshall*, 576 F.2d, 39 (8th Cir. 1978), cert. denied 439 U.S. 96 (1978); *Todd Shipyards Corp.*, 1984 OSHD paragraph 27,001 (1984).

Moreover, when the job foreman was apprised of the violation by the OSHA Inspector, he refused to agree on an abatement date. He maintained belligerent opposition until threatened with a total job shutdown. Under the

circumstances of the instant case, the Complainant has established that the Employer directly and through its job foreman acted with callous disregard for the safety of its employees in violating the applicable OSHA Standard and, as such, a willful violation of the standard has been established.

There was an assertion by the Employer that, to be the best of its knowledge, sufficient trees had been removed to obtain the required 'borrow' fill and that the removal of additional trees was unauthorized. The record, however, substantiates an entirely different conclusion. At the time of the

OSHA inspection and for at least an additional six weeks, trees were removed at the "borrow" fill site at the specific direction of the project engineer and the Employer's job foreman. At no time did employees take it upon themselves to remove additional trees or brush. On the day of the OSHA inspection, the operator of the Fiat-Allis 41B bulldozer was specifically instructed by the Job foreman, Lawrence Becker, to use the unprotected Fiat-Ailis 41B bulldozer to fell trees, remove fallen trees and pile brush. Moreover, he had used the same bulldozer to perform similar tasks the prior day. Under such circumstances, there is no evidence in the record to support a defense of employee misconduct or any other affirmative defense to the violation.

The Complainant asserts that the penalty for the willful violation established should be increased to be consonant with a F-10 rather than a F-6 violation. Increasing a proposed penalty based on the hearing record is within the authority of the Administrative Law Judge. Robert T. Winzinger, Inc., 1976-77 OSHD paragraph 20,929 (1976); Boring & Tunneling Co. of America, Inc., 1975-76 OSHD paragraph 20,253 (1975). The Administrative Law Judge has determined however, that the violation established is properly termed a F-6 violation as found by the Central Office of Complainant.

The Complainant attempts to increase the penalty through testimony of the Inspector that certain of the factors were aggravated which, in his judgment, would substantiate an F-10 violation. The OSHA Inspector initially assigned an F-10 rating to the violation and that rating was reduced by the Central Office of Complainant to an F-6 rating by reducing the factor relating to injury information from I to 2 and reducing from 5 to 2 the rating for employee control. For purposes of uniformity and consistency over employers throughout the state, it is appropriate to uphold the rating assigned to the violation by the Central Office of Complainant which finds support in the record. Certainly the Minnesota Office of the Complainant is the most knowledgeable regarding injury information through the collection of published information and studies. Finally, the aggravated hazard reflected in the OSHA Inspector's factor of employee control is a matter of subjective judgment in which uniformity among employers is important.

Apparently, the Complainant assigned a 50% credit factor to the F-6 willful violation as it had done with one less serious violation. In proposing a penalty, it apparently assigned a 10% good faith credit and made a mathematical error in the numerical calculation. The Administrative Law Judge determines that no credit for good faith is consistent with a finding of a



willful violation in which the Employer has acted with callous disregard for the safety of his employees. See, J.M. Roofing Co., 1974-1975 OSHD paragraph 19,157 (1974).

Hence, the Administrative Law Judge has reduced the credit factor to 40%. An unadjusted penalty of \$5,040 adjusted by a 40% credit factor results in an adjusted penalty of \$3,024, the amount which the Complainant initially sought to impose as a consequence of a mathematical error.

B.D.C.

